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STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

February 8, 2008

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

Oahu

RESUBMITTAL - Sale of Lease at Public Auction for Commercial Purposes,
Waikiki, Honolulu, Oahu, Hawaii; Tax Map Key: (1) 2-7-36:04 and 16

REQUEST:

Sale of lease at public auction for commercial purposes as allowed under the City and County Honolulu zoning ordinance.

LEGAL REFERENCE:

Sections 171-6, 13, 14, 16, 17, 35, 36, and other applicable sections of Chapter 171, Hawaii Revised Statutes, as amended ("HRS").

LOCATION:

Portion of Government lands situated at Waikiki, Honolulu, Oahu, identified by Tax Map Key (1) 2-7-036:04 and 16 and shown on CSF Map No. 24,024 attached to **Exhibit A**.

AREA:

24,407 square feet, more or less, subject to confirmation by the Department of Accounting and General Services, Survey Division. The subject property is one legally subdivided lot with separate TMK numbers issued solely for real property tax purposes.

ZONING:

State Land Use District:	Urban
City and County of Honolulu:	B-2 (commercial); Diamond Head Special District

TRUST LAND STATUS:

Section 5(a) lands of the Hawaii Admission Act
DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: No

CURRENT USE STATUS:

Vacant and unencumbered

CHARACTER OF USE:

Commercial and any other purposes allowed under the City and County of Honolulu ("City") zoning ordinance

LEASE TERM:

Sixty-five (65) years from the commencement date of the lease

UPSET MINIMUM ANNUAL BASE RENT:

\$180,000.00

A staff appraisal dated May 31, 2006 estimated the annual fair market rent at \$287,440. However, HRS Section 171-11(a) authorizes the Board to approve an annual upset rent that is less than the staff appraised value, and staff believes it would be appropriate to do so in this instance to increase participation in the public auction process and produce competitive bidding.¹

KNOWN RENT PERIOD:

Thirty (30) years, subject to fixed increases in the minimum annual base rent

FIXED INCREASES IN MINIMUM ANNUAL BASE RENT:

The frequency and amount of increases in the minimum annual base rent during the 30 year known rent period to be determined by staff or independent appraisal, subject to review and approval by the Chairperson.

PERCENTAGE RENT:

If any of the following uses are conducted on the property, including by any sublessee, the lessee shall pay a percentage rent based on the gross revenues from such uses or operations: catering establishments, convenience stores, restaurants, bars, nightclubs, self-storage facilities, theaters, home improvement centers, or any other retail establishments permitted on the property under the City zoning ordinance, as such zoning ordinance may be amended from time to time. The percentage rent shall be determined by staff or independent appraisal, subject to review and approval by the Chairperson.

EFFECTIVE RENTAL:

The greater of the annual minimum base rent or annual percentage rent, if any.

FREQUENCY OF RENT PAYMENTS:

Annual minimum base rent to be paid in semi-annual payments, in advance. Percentage rent, if any, to be paid annually in arrears, no later than sixty (60) days after the close of the lessee's fiscal year; provided, however, that the Chairperson may extend the deadline for payment of percentage rents for good cause.

RENT WAIVER:

The lease rental for the first twelve (12) months after the commencement date of the lease shall be waived, pursuant to HRS § 171-6 (7).

¹ Staff has consulted with various real estate professionals (including appraisers and brokers) and believes the actual rent for the property may vary from the appraised value due a variety of factors, including the broad range of permitted uses within the B-2 zoning district, the additional restrictions imposed by the Diamond Head Special District and the Unilateral Agreement, the increase in construction costs, and other site characteristics (e.g., location of permitted roadway access). In November 30, 2006, DLNR offered ground leases for six vacant industrial zoned parcels in the Mill Town industrial subdivision in Waipahu, Oahu. DLNR received only one application, and the applicant ultimately did not participate in the auction. Staff believes the lack of interest in the leases was in large part due to the upset rent being too high. To avoid a similar situation with the subject property, staff recommends the upset rent be established at less than the appraised value.

QUARTERLY AND ANNUAL REPORTS:

Lessee shall submit quarterly reports no later than 30 days after the close of the quarter detailing the gross revenues from uses and operations on the property. Lessee shall also submit an annual report of the gross revenues within sixty (60) days after the close of the Lessee's fiscal year. Lessee shall submit the quarterly and annual reports even if no percentage rent is payable.

RENTAL REOPENINGS:

At the end of the 30th, 40th and 50th year of the lease term, as determined by staff or independent appraisal.

PERFORMANCE BOND:

Twice the amount of the annual base rent.

IMPROVEMENT BOND:

Amount of improvements. The Lessee, upon submittal and written approval by the Chairperson of the construction plans for the proposed improvements, shall within sixty (60) days procure and deposit with DLNR a surety bond, acceptable to the Chairperson, in an amount equal to the cost of construction of the proposed improvements.

SUBLETTING:

Lessee shall be permitted to sublet portions of the property located within the improvements constructed on the property without further consent of the Lessor; provided, however, that Lessee shall notify Lessor of any sublease and provide Lessor with a copy of the sublease and the contact information for the sublessee.

UNILATERAL AGREEMENT AND DECLARATION FOR CONDITIONAL ZONING ("UA"):

The property is encumbered by and subject to the terms and conditions of that certain Unilateral Agreement and Declaration for Conditional Zoning dated June 1, 2007 and recorded in the State of Hawaii Bureau of Conveyances as Document No. 2007-099010 (the "UA"), a copy of which is attached as **Exhibit A**. The UA was required by the City and County of Honolulu ("City") as a condition to the City's rezoning of the property from the R-5 district to the B-2 district pursuant to Ordinance No. 07-32.

The Lessee shall comply with all such conditions and restrictions imposed by the UA. The Lessee shall also submit to DLNR an annual status report by September 30th of each year describing the Lessee's progress towards complying with each condition of the UA, which report may be incorporated into DLNR's annual status report to the City required under UA Condition 5.

PAYMENTS BY THE SUCCESSFUL BIDDER:

Within one (1) day of the auction, the successful bidder shall (i) reimburse DLNR for the costs incurred by DLNR in connection public auction, (including but not limited to the costs of preparing the lease document, survey map and description, and publication costs); and (ii) pay to DLNR an initial deposit equal to fifty percent (50%) of the winning annual minimum base rent bid at the public auction (the "Initial Deposit").

DUE DILIGENCE:

The successful bidder at the public auction shall have sixty (60) calendar days from the date of the auction to conduct a due diligence investigation of the suitability of the property and to decide if the successful bidder will continue with the lease of the property (the "Due Diligence Period"). If the successful bidder notifies the Chairperson, in writing, prior to the expiration of the Due Diligence Period, that the successful bidder does not wish to proceed with the lease of the property, the successful bidder will obtain a full refund of the Initial Deposit (as described above), and neither the successful bidder nor DLNR shall have any further rights, duties or obligations regarding the lease for the property. If the successful bidder does not timely notify the Chairperson, in writing, but prior to the execution of the lease decides not to proceed with the lease of the property, then the successful bidder shall be in default and twenty-five percent (25%) of the Initial Deposit shall become fully nonrefundable and retained by DLNR as liquidated damages.

Easement over Adjacent Property. The City and County of Honolulu, Department of Planning and Permitting has recommended the lessee make a good faith effort to obtain an easement over the adjacent mauka property (identified by TMK (1) 2-7-036:03) to allow access to the subject property from the existing signalized Kapahulu/Campbell Avenue intersection. The successful bidder shall make such efforts to obtain an easement over the adjacent property during the Due Diligence Period and provide a written report to DLNR detailing such efforts and the results of such efforts. The report shall be submitted to DLNR prior to expiration of the Due Diligence Period, and DLNR may request further reports updating the successful bidder's efforts to obtain an easement.

COMMENCEMENT DATE:

The commencement date shall be thirty (30) days after expiration of the Due Diligence Period, provided that if such date is not on the first day of any month, the commencement date shall be the first day of the month following such date; and further provided that the Chairperson may amend the commencement date for good cause.

PROPERTY CHARACTERISTICS:

Utilities - Electricity, water, telephone, sewer

Legal access to property – direct access to Kapahulu Avenue

Subdivision – Staff has verified that the subject property to be auctioned is a legally subdivided lot

Encumbrances – Unilateral Agreement and Declaration for Conditional Zoning recorded as Document No. 2007-099010 and attached as **Exhibit A**.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

An environmental assessment (EA) was prepared and submitted as part of DLNR's Change of Zone application to the City for the subject property. The EA discussed the impacts and mitigation measures with respect to DLNR's proposed zone change from residential to commercial use. The Final EA was published in the OEQC's Environmental Notice on February 8, 2006 with a finding of no significant impact (FONSI).

REMARKS:

A. BACKGROUND:

DLNR manages over 1.3 million acres of public lands and the majority of the State's natural resources. In connection with this duty, DLNR utilizes a small percentage of the lands it manages to generate revenues to support and fund DLNR's management of public lands, natural resources, facilities, and programs.² This management philosophy is similar to those employed by other major land trusts, which utilize a portion of their lands for revenue generating purposes to support the missions and purposes of their respective trusts. Recent public programs funded in part by DLNR's lease rent revenues include rockfall mitigation and stream maintenance and flood prevention.

Staff believes the site has excellent development and revenue generating potential as a commercial site, and that offering a commercial ground lease would substantially increase the return to the State on this asset.³ Use of the site, however, had been severely restricted due to the then-existing R-5 (residential) zoning. Staff proposed seeking a zone change to allow commercial use noting the City and County of Honolulu's ("City") Primary Urban Center Development Plan's designation of commercial use for the site, and the fact that commercial zoning and use was prevalent along the entire stretch of Kapahulu Avenue from the H-1 Free to Ala Wai Boulevard.

On January 9, 2004, the Board granted approval in principal of the sale of a commercial ground lease for the subject property at public auction (Agenda Item D-3), and staff subsequently initiated a rezoning application with the City seeking B-2 (community business) zoning. On March 9, 2007, the Board unanimously reaffirmed its support of proposed commercial lease and staff's rezoning efforts, and on July 20, 2007, the City Council approved the rezoning pursuant to Ordinance 07-32.

B. HISTORY OF THE PROPERTY:

The property consists of approximately 24,407 square feet and is located on Kapahulu Avenue, near Date Street. The property is surrounded by the Prudential Locations building to the north, the Ala Wai Golf Course to the west, and a Board of Water Supply booster station to the south.

The property was previously set aside to the Department of Health for health purposes by EO 1296 dated December 6, 1948. DOH constructed and operated the Kapahulu Health Center on the site until the Health Center was destroyed by a fire in 1996. DOH elected not to reconstruct the Health Center and the lands were subsequently withdrawn from EO 1296 in 2002 and returned to DLNR (by EO 3906 dated March 4, 2002).

DLNR subsequently issued two month-to-month revocable permits (RPs) that allowed certain nearby businesses to use the property for employee and customer parking on a temporary basis until DLNR determined an appropriate long-term use. The RPs were

² DLNR is charged with management of the State's water resources, ocean waters, navigable streams, coastal areas, and minerals, as well as the management of the state parks, historical sites, forests, forest reserves, aquatic life, aquatic life sanctuaries, public fishing areas, boating, ocean recreation, coastal programs, wildlife, wildlife sanctuaries, game management areas, public hunting areas, natural area reserves, and other functions assigned by law. See HRS §171-3

³ The site currently generates no revenues for the State. Annual revenues totaled \$15,000 under the previous RPs.

issued to (1) Hawaiian Dredging Company (which previously occupied the adjacent property now owned by Prudential Locations); and (2) the New Kapahulu Business Association ("NKBA", an unincorporated association consisting of several businesses in the area). Parking was restricted to the permittees' customers and employees and was not open to the general public.

The RP to Hawaiian Dredging Company was terminated in 2006 when the company sold the adjacent property to Prudential Locations. The RP to the NKBA was terminated in 2007 when DLNR learned that NKBA (which at that time, primarily consisted of approximately five businesses located across Kapahulu Avenue) had been delinquent on real property taxes assessed on the RP lands since 1998.

Over the years, there have been multiple reports of unauthorized entry, homeless, and illegal activities on the property. Previous attempts by NKBA to chain and lock the property at night resulted in the chains and locks being cut. Such activities have continued after termination of the RPs, and DLNR staff has been tasked with posting Notices to Vacate in response to complaints about homeless persons living on the property. Staff believes that development of the site will help to eliminate or substantially reduce such unauthorized activities on the property.

C. OTHER ISSUES:

Proposed Municipal Parking Lot. The Diamond Head/Kapahulu/St. Louis Heights Neighborhood Board No. 5 has requested the property be leased to the City for a community center or a municipal parking lot. Senator Les Ihara and Representative Scott Nishimoto have also previously requested the property be leased to the City at a lease rent of \$1/year for a municipal parking lot. The City, however, has indicated it does not intend to fund, construct or operate either a community center or municipal parking lot on the property. Qualified commercial parking operators, however, may apply to participate in the public auction.

Proposed Community Center. In 2000, under the City's former "Vision Team" program, Vision Team No. 17 undertook a planning program for the Kapahulu area. One of the initiatives of the planning program was to select a site for a new community center. The Vision Team selected the subject property as the preferred site for the proposed community center notwithstanding the fact that the subject property (24,407 sq. ft.) failed to meet the minimum site requirements for the community center of 92,080 sq ft. The selection of the DLNR site was based on the assumption that portions of the adjacent BWS parcel and the Ala Wai Golf Course would be acquired at no cost to meet the minimum size requirements.⁴

Office of Hawaiian Affairs ("OHA"). OHA submitted comments to DLNR's draft environmental assessment and rezoning application, which are summarized as follows: (1) an archaeological monitoring plan should be drafted; (2) assurances should be given that construction work will cease should iwi or Native Hawaiian cultural or traditional deposits be found during construction; and (3) OHA does not anticipate any known native Hawaiian practices or resources within the subject property will be adversely affected. DLNR's response letter to OHA confirmed that any lease will include conditions that (i) provide for the lessee's rights to be subject to the rights of native tenants; and

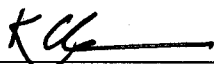
⁴ DLNR was not consulted during the site selection process, and there does not appear to be any agreement from BWS or the City Department that operates the Ala Wai Golf Course to provide land for the community center.

(ii) require the lessee to immediately stop work if any historic properties or burial sites are found on the subject property. OHA was also informed that an archaeological monitoring plan was not anticipated because DLNR SHPD had determined no historic properties would be affected.

RECOMMENDATION: That the Board:


1. Find the area to be an economic unit in terms of the intended use.
2. Find that the subject area is not suitable for hunting, nor will it become so during the term of the lease.
3. Authorize the sale of a lease at public auction covering the subject area for business or commercial purposes as allowed pursuant to County zoning under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
 - a. The standard terms and conditions of the most current business/commercial general lease form, as may be amended from time to time;
 - b. Waiver of the Board's consent to subleases of areas within the lessee's improvements as described above;
 - c. Review and approval by the Department of the Attorney General; and
 - d. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,



Keith Chun
Planning and Development Manager

APPROVED FOR SUBMITTAL:



LAURA H. THIELEN, Chairperson

EXHIBIT A

made a part hereof (the "Land"), and desire to make the Land subject to this Unilateral Agreement; and

WHEREAS, the City Council ("Council") of the City and County of Honolulu ("City"), pursuant to the provisions of the Land Use Ordinance ("LUO"), Revised Ordinances of Honolulu 1990 ("ROH") Section 21-2.80, as amended, related to conditional zoning, is considering a change in zoning under the LUO of the Land from R-5 Residential District to B-2 Community Business District with a 40-foot height limit (the "zone change"); and

WHEREAS, a public hearing regarding the zone change, Bill 1 (2007), was held by the Council on January 21, 2007; and

WHEREAS, the Council recommended by its Zoning Committee Report No. 223 that said zone change be approved, subject to the following conditions contained in this Unilateral Agreement to be made pursuant to the provisions of ROH Section 21-2.80, as amended, relating to conditional zoning, and to become effective on the effective date of the zoning ordinance approving the zone change (the "Rezoning Ordinance");

NOW THEREFORE, the Declarant hereby covenants and declares as follows:

1. **Revised Traffic Impact Analysis Report (TIAR).** Prior to building permit approval a revised Traffic Impact Analysis Report (TIAR) shall be submitted to and approved by the City Department of Transportation Services and the City Department of Planning and Permitting. Both departments should be consulted regarding the scope of the TIAR. The TIAR shall discuss the result of discussions with the owner of the adjacent Prudential Locations property to secure an access easement.
2. **Disclosure.** The Declarant shall inform all prospective purchasers or lessees of the Land of all of the following:
 - a. The Land is subject to possible errant golf balls from the Ala Wai Golf Course. Design of the development of the Land should account for the possibility of such errant golf balls.
 - b. Mowing and maintenance of the Ala Wai Golf Course may result in noise and other impacts.
3. **Mature Trees.** At the time of the submittal of the Diamond Head Special District permit application or prior to tree removal, clearing, and/or grubbing, whichever occurs first, the Declarant shall submit to the Department of Planning and Permitting for approval a map showing all existing trees having a

trunk diameter greater than six inches, their species, canopy spread, and tree height.

4. Compliance with Other Governmental Requirements.

The Declarant shall be responsible for ensuring that the final plans for the proposed development of the Land shall comply with all applicable Land Use Ordinance and other governmental agencies' provisions and requirements.

5. Annual Reports.

On an annual basis, the Declarant shall submit a written status report to the Department of Planning and Permitting documenting its satisfaction of and/or describing its progress toward complying with each condition of this Unilateral Agreement. The status report will be submitted by December 31 of each year until such time as the Department of Planning and Permitting has determined that all conditions of this Unilateral Agreement have been satisfied. If a status report is not submitted within the time specified, the Department may defer the processing of permits until a status report is submitted.

6. Noncompliance with Conditions.

In the event of noncompliance with any of the conditions set forth herein, the Director of Planning and Permitting shall inform the Council and may institute action to rezone the Land, seek civil enforcement, or take appropriate action to terminate or stop the development of the Land until applicable conditions are met. Failure to fulfill any conditions of this Unilateral Agreement may be grounds for revocation of the permits issued under this zoning and grounds for the enactment of ordinances making further zone changes, including revocation of the underlying zoning, upon initiation by the proper parties in accordance with the Revised City Charter.

NOW, THEREFORE, the Declarant hereby makes the following additional declarations:

As used herein, references to a specific City department or agency shall be deemed to include a reference to any successor department or agency.

That the conditions imposed herein are reasonably conceived to fulfill public service demands created by the requested zone change and are rationally related to the objective of preserving the public health, safety and general welfare and the further implementation of the General Plan of the City.

That the development of the Land shall conform to the aforesaid conditions with the understanding that, at the request of the Declarant and upon the satisfaction of the conditions set

forth in this Unilateral Agreement, the Department of Planning and Permitting may fully or partially release, as applicable, any of the foregoing conditions that have been fulfilled.

That if there are any conflicts between this Unilateral Agreement and any previous unilateral agreement(s) applicable to the Land, the terms and conditions of this Unilateral Agreement shall apply.

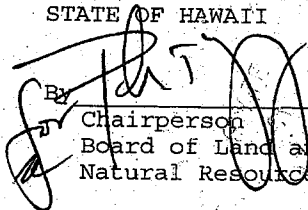
That if there are any conflicts between this Unilateral Agreement and any applicable public land laws or statutes, the provisions of the public land laws or statutes shall apply.

AND IT IS EXPRESSLY UNDERSTOOD AND AGREED that the conditions imposed in this Unilateral Agreement shall run with the land and shall bind and constitute notice to all the parties hereto and subsequent lessees, grantees, assignees, mortgagees, lienors, successors, and any other persons who have or claim to have an interest in the Land, and the City shall have the right to enforce this Unilateral Agreement by rezoning, appropriate action at law or suit in equity against all such persons, provided that the Declarant or its successors and assigns may file a petition with the Department of Planning and Permitting for amendment or removal of any conditions or termination of this Unilateral Agreement, such petition to be processed in the same manner as petitions for zone changes.

IN WITNESS WHEREOF, the STATE OF HAWAII, by its Board of Land and Natural Resources, has caused the seal of the Department of Land and Natural Resources to be hereunto affixed and executed this Unilateral Agreement and Declaration for Conditional Zoning on the day, month and year first above written.


STATE OF HAWAII

Approved by the Board
of Land and Natural
Resources at its meeting
held on March 9, 2007.

By 
Chairperson
Board of Land and
Natural Resources

Declarant

APPROVED AS TO FORM:


Deputy Attorney General

Dated: 6/1/07



STATE OF HAWAII

SURVEY DIVISION

**DEPT. OF ACCOUNTING AND GENERAL SERVICES
HONOLULU**

C.S.F. No. 24,024

April 29, 2005

COMMERCIAL LEASE SITE

Waikiki, Honolulu, Oahu, Hawaii

Being a portion of Royal Patent 4889, Land Commission Award 35, Fort Land, Apana 2 to Mahuka conveyed to the Territory of Hawaii by Trustees under the Will and of the Estate of Bernice Pauahi Bishop, deceased, by deed dated June 14, 1921 and recorded in Liber 605, Page 20 (Land Office Deed 2033).

Beginning at the northeast corner of this parcel of land, at the southeast corner of Lot A as shown on Map 2 of Land Court Application 1542 and on the northwest side of Kapahulu Avenue, the coordinates of said point of beginning referred to Government Survey Triangulation Station "DIAMOND HEAD 2" being 6669.17 feet North and 781.07 feet West, thence running by azimuths measured clockwise from True South:-

1. Along the northwest side of Kapahulu Avenue on a curve to the right with a radius of 490.00 feet, the chord azimuth and distance being:
20° 32' 44" 149.16 feet;

Exhibit A-

C.S.F. No. 24,024

April 29, 2005

2. 29° 18' 98.00 feet along the northwest side of Kapahulu Avenue;
3. 119° 18' 110.00 feet along Diamond Head Booster Station, Governor's Executive Order 2569;
4. 209° 18' 211.44 feet along Ala Wai Golf Course and Park Site, Governor's Executive Order 3885;
5. 278° 02' 30" 93.68 feet along Ala Wai Golf Course and Park Site, Governor's Executive Order 3885 and Lot A as shown on Map 2 of Land Court Application 1542 to the point of beginning and containing an AREA OF 24,407 SQUARE FEET.

SURVEY DIVISION
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
STATE OF HAWAII

By: 

Reid K. Siarot
Land Surveyor

gm

Compiled from CSFs 23162,
23218 and other Govt. Survey
Records.

